SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA, Plaintiffs, v. CAPITOL PETROLEUM GROUP, LLC et al, Defendant.	Civil Action No. 2020 CA 004671 B Civil II - Calendar 11 Judge Hiram E. Puig-Lugo

ORDER

This matter is before the Court on Defendant's Motion to Dismiss, filed on December 28, 2020, Plaintiff's opposition, filed on January 11, 2021, and Defendants' Reply, filed on January 19, 2021.

To survive a Motion to Dismiss, a Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). Dismissal of a Complaint for failure to state a claim upon which relief can be granted should only be awarded if "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See* Super. Ct. Civ. R. 12(b)(6); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999).

When considering a Motion to Dismiss, a Court must "construe the facts on the face of the Complaint in the light most favorable to the non-moving party, and accept as true the allegations in the Complaint." *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A Court

should not dismiss a Complaint merely because it "doubts that a Plaintiff will prevail on a claim." *See Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997). However, the Court need not accept inferences if such inferences are unsupported by the facts set out in the Complaint. *See Kowal v. MCI Comm. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Nor must the Court accept legal conclusions cast in the form of factual allegations. *Id.*

A pleading must contain a "short and plain statement of the claim showing that the pleading is entitled to relief." *See* Super. Ct. Civ. R. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). To survive a Motion to Dismiss under Super. Ct. Civ. R. 12(b)(6), a Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the Plaintiff pleads factual content that allows the Court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Id.*

Under the District of Columbia Natural Disaster Consumer Protection Act (NDCPA), It shall be unlawful for any person to charge more than the normal average retail price for any merchandise or service sold during an emergency that resulted from a natural disaster, if an emergency has been declared. D.C. Code § 28-4102(a). Normal average retail price" means: (A) In the case of services, not more than 10% more than the price at which similar services were sold or offered in the Washington Metropolitan Area during the 90-day period that preceded an emergency that resulted from a natural disaster, if an emergency is declared pursuant to § 28-4102(b); or (B) In the case of merchandise, the price equal to the wholesale cost plus a retail mark-up that is the same percentage over wholesale cost as the retail mark-up for similar merchandise sold in the Washington Metropolitan Area during the 90-day period that immediately preceded an emergency that resulted from a natural disaster, if an emergency has been declared pursuant to § 28-4102(b).

Defendant asserts that Plaintiff's Complaint makes extremely broad allegations and does not contain the necessary factual content. Defendant asserts that Plaintiff fails to allege the percentage "mark-up" in the Washington Metropolitan Area (WMA) during the 90-day period preceding the Mayor's March 11 Declaration and without this mark-up, the District cannot calculate the normal average retail price nor that Defendant's retail prices exceeded it. Defendant asserts that Plaintiff's Complaint fails to allege the normal average retail price for any product, at any gas station, on any day, or any of Defendant's retail prices, much less one that exceeds the applicable normal average retail price. Defendant asserts that because Plaintiff failed to state a claim for NDCPA, it necessarily follows that it failed to state a claim for a violation of the D.C. Consumer Protection Procedures Act (CPPA). Defendant asserts that neither NDCPA nor the CPPA applies to wholesale transactions. Defendant asserts that the NDCPA is violated when a retail price exceeds the normal average retail price and the CPPA is wholly inapplicable to wholesale sales and only applies to consumer transactions, which are sales between the final seller and the individual member of the consuming public.

In opposition, Plaintiff asserts that notice pleading requirements of Rule 8 require only that the complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Plaintiff asserts that its complaint summarizes the pricing data from fifty-four stations to allege that Defendant increased the average markup at such stations from approximately $0.44 per gallon of regular unleaded gasoline during the three months immediately preceding the March 11 Declarations to approximately $0.88 per gallon of regular unleaded gasoline in the months following the declarations. Further, Plaintiff asserts that Defendants' interpretation of the CPPA is erroneous and Defendants' narrow reading is contrary

to the explicit statutory command that the CPPA shall be construed and applied liberally to promote its purpose.

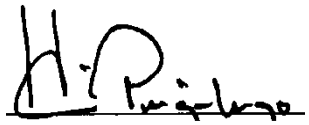
In Reply, Defendant asserts that it is a violation of the NDCPA to exceed the normal average retail price and Plaintiff has failed to state what the normal average retail price is of any product and the price of any "Defendant that allegedly exceeded it." Defendant asserts that it is not on any notice of when they are alleged to have violated the NDCPA, at which stations, for which products, and on the basis of which retail prices. Defendant asserts that Plaintiff asks the Court to assume the alleged violations on the basis of certain average mark-ups which are not referred to in the NDCPA. Defendant asserts that Defendant's average mark-up is of no use in calculating the normal average retail price on any day at any station. Defendant asserts that the actual retail price on the alleged date of violation is necessary to compare to the normal average retail price for the same product on the same day.

The Court finds that Plaintiff's Complaint is sufficiently pled and Defendants' motion to dismiss is denied as such. The Court finds that Plaintiff pled factual content to allow the Court to draw the reasonable inference that the Defendants are liable for the misconduct alleged. Indeed, Plaintiff has stated the average mark-up during the 90-days preceding the emergency declaration and alleged the mark-up following the emergency declaration. Plaintiff included in its Complaint the Defendant's average mark-up, the average retail price, and average acquisition cost per gallon. Further, Plaintiff has pled information relevant to the products of which it alleges Defendant is in violation of the statute; namely, gasoline. Defendant makes many assertions that are blanketly false. For example, Defendant asserts Plaintiff fails to express "a percentage of anything," yet Plaintiff's Complaint clearly summarizes and states the average mark-ups in percentages in paragraph 21 and 22. Moreover, Defendant's motion appears to be

arguing the merits of the case as well as asserting a heightened pleading standard which the Court will not allow. Indeed, Defendants are on notice of the claims against them and the Court will not address the merits of Plaintiff's case under the applicable standard in which the Court must construe the facts on the face of the complaint in the light most favorable to the non-moving party and accept as true the allegations in the Complaint. Additionally, Plaintiff has pled sufficient factual content to proceed with a CPPA claim. Indeed, under the CPPA, a merchant means a person who in the ordinary course of business does or would sell, lease, or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods of services which are or would be the subject matter of a trade practice. Defendant sells or supplies gasoline to consumers and to retailers. Thus, viewing Plaintiff's complaint in a light most favorable to Plaintiff, Plaintiff has sufficiently pled a CPPA violation. Accordingly, under the permissive standard that must be applied at this juncture, it is this 27th day of January 2021, hereby:

ORDERED that Defendant's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.



Judge Hiram Puig-Lugo
Signed in Chambers

Copies via CaseFilexpress to all counsel of record.